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KELLEY DRYE & WARREN LLP

A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D. C. 20036

(202) 955-9600

FACSIMILE

(202) 955-9792

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DANNY E. ADAMS

DIRECT LINE (202) 955-9874

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May 8, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

**Re: Petitions Seeking Declaratory Ruling Preempting Arkansas Public
Service Commission -- CC Docket No. 97-100**

Dear Ms. Salas:

On March 25, 1997 American Communications Services, Inc. d/b/a e.spire Communications, Inc. ("e.spire") filed a Petition for Declaratory Ruling (e.spire Petition) requesting that, pursuant to Sections 252(e)(5) and 253(d) of the Communications Act of 1934, as amended ("Communications Act"),¹ the Commission preempt the Arkansas Public Service Commission ("Arkansas PSC") in its arbitration of local interconnection agreements. As e.spire has explained in detail elsewhere, its request was made necessary by certain provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act"), which effectively prohibit the Arkansas PSC from accomplishing its duties as an arbitrator under Section 252 of the Communications Act. MCI Telecommunications Corporation, Inc. ("MCI") filed a similar petition on June 3, 1997 ("MCI Petition"). The e.spire Petition and the MCI Petition were consolidated into a single proceeding in Docket No. 97-100; both petitions remain pending.

Since the closing of the comment cycles, developments significant to the issues presented in the e.spire Petition continue to unfold. On February 18, 1998 the Arkansas PSC issued its Order No. 11 in the ongoing interconnection proceedings between AT&T Communications of the Southwest, Inc. ("AT&T") and Southwestern Bell Telephone Company

¹ 47 U.S.C. §§ 252(e)(5), 253(d) (1996).

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("SWBT").² In Order No. 11 the Arkansas PSC concluded that under the Arkansas Act its authority to arbitrate interconnection issues is limited to the terms, conditions, and agreements to which SWBT would agree to provide interconnection, resale, and unbundling to AT&T. Further, the Arkansas PSC found that it had no authority to order SWBT to include in an interconnection agreement any terms or conditions which it was not voluntarily willing to provide to AT&T as a competitor.³ Subsequently, AT&T and SWBT each responded to a series of questions issued to them by the FCC regarding Order No. 11; on April 16, e.spire commented on the AT&T and SWBT ex parte submissions. In that letter e.spire pointed out that the essential issue before the FCC in this proceeding is the fundamental disconnect between the Arkansas Act and the Communications Act: while the Arkansas Act limits the Arkansas PSC to imposition on CLECs of the "minimum" interconnection requirements of the federal Act, the federal Act establishes no such "minimums." Rather, the federal Communications Act articulates pro-competitive principles and establishes policy guidelines regarding the shared role of the FCC and the state commissions in interconnection arbitrations. Given this federal scheme, resolution of specific issues raised in individual proceedings rests within the discretion of both the FCC and the state commissions. Only the exercise of this contemplated informed discretion can result in interconnection agreements that comply with Sections 251 and 252 and best serve the public interest. Because the Arkansas Act effectively prevents the Arkansas PSC from fulfilling its role in this scheme, e.spire explained, the FCC must assume that role.

On April 17, 1998 the Arkansas PSC issued Order No. 12 in response to a motion filed by SWBT requesting clarification and reconsideration of Order No. 11 ("Motion").⁴ In its Motion SWBT stated -- not surprisingly -- that it agreed with the Arkansas PSC that the Arkansas Act requires it to decide all issues in the interconnection arbitration between AT&T and SWBT in favor of SWBT. However, SWBT requested that the PSC (1) explain *why* SWBT should prevail on each issue in the arbitration, (2) make specific findings on SWBT's costs and pricing, and (3) specifically find that SWBT's resale rates have been set on the basis of retail rates less marketing, billing, and certain other costs.⁵ Further, SWBT

² *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Sec. 252(b) of the Telecommunications Act of 1996*, Order, Arkansas Public Service Commission, Docket No. 96-395-U (filed Feb. 18, 1998) ("Order No. 11").

³ *Id.* at 5-6.

⁴ *AT&T Communications of the Southwest, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Sec. 252(b) of the Telecommunications Act of 1996*, Order, Arkansas Public Service Commission, Docket No. 96-395-U (filed April 17, 1998) ("Order No. 12").

⁵ *Id.* at 1.

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requested that the PSC make these findings so as "to clearly show that [the PSC] has not abdicated its authority or responsibilities pursuant to state and federal law."⁶ The PSC, quite correctly in e.spire's view, denied SWBT's Motion, stating that under the Arkansas Act it quite simply does not have the authority to grant SWBT's requests, and, therefore, could not "abdicate" any such authority.⁷ The PSC found that, pursuant to the Arkansas Act, just as it lost any meaningful authority to impose appropriate interconnection terms, conditions, and agreements on SWBT, so too did it lose all authority and jurisdiction to regulate or evaluate SWBT's rates and charges for interconnection, resold services, and UNEs.⁸

Order No. 12 further clarifies the extent to which the Arkansas PSC believes that the Arkansas Act has eviscerated its authority to act in the arbitration context, and therefore further underlines the necessity for the Commission to grant e.spire's Petition. As e.spire discussed in its first ex parte submission and in its Petition, in ascertaining the so-called "minimum" requirements of Section 251, federal law requires that the PSC consider, in addition to the language of Section 251, the language of the Communications Act as a whole, its legislative history and underlying policies, and the Act's overarching purpose of creating and nurturing local competition. The Arkansas Act, by contrast, precludes the PSC from imposing on SWBT -- absent SWBT's agreement -- anything more than the express requirements of the Communications Act and the few remaining valid provisions of the *Local Interconnection Order*. Further, Order No. 12 highlights the fact that the Arkansas PSC cannot comply with the directives of Section 252 because, under the Arkansas Act, not only is it constrained to approve only the terms and conditions offered by SWBT, but it cannot investigate in any depth, and reach appropriate conclusions regarding, those terms and conditions. Thus, the Arkansas PSC clearly is prohibited by the Arkansas Act from choosing in any considered manner from among the full range of interconnection options permissible under the Communications Act. Rather, the Arkansas Act effectively transfers to SWBT the authority given to the PSC by the Communications Act to determine how best to promote local competition through the interconnection negotiation and arbitration process. Or, in other words, as the PSC stated in Order No. 12, "[r]egardless of what requirements the [PSC] might find to be equitable and in the public interest, Section 9 of Act 77 limits the [PSC's] authority in an arbitration by mandating approval of the ILEC's position if the ILEC offers interconnection terms which meet the minimum requirements of 47 U.S.C. § 251."⁹ Thus, because the Arkansas PSC cannot carry out the duties assigned to it by the Communications

⁶ *Id.* at 2.

⁷ *Id.*

⁸ *Id.* at 7-8.

⁹ *Id.* at 3.

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Act, the FCC should preempt the PSC and assume its interconnection arbitration responsibilities.

The Arkansas PSC also noted in Order No. 12 that implementation of the 1996 Act involves not only opening local markets to competition pursuant to Sections 251 and 252, but also increasing the number of carriers in the interexchange markets pursuant to Section 271.¹⁰ In an admirable attempt to ensure that the people of Arkansas reap the benefits of the implementation of these pro-competitive policies of the 1996 Act, and despite the statutory restrictions on its authority, the PSC effectively has offered to grant SWBT's request regarding the appropriateness of its costs and pricing. The PSC indicated in Order No. 12 that it will reopen the arbitration in order to establish a record regarding SWBT's pricing of interconnection, resold services, and UNEs on which the PSC could make findings for the purposes of compliance with Section 271.¹¹ Of course, the PSC's offer is dependent upon the "voluntary cooperation" of SWBT.¹² (e.spire would note that the fact that the PSC requires the "voluntary cooperation" of SWBT in order to "effectively fulfill" the consulting role assigned to it by Section 271 underscores even further the need for the FCC to step into the breach created by the Arkansas Act.) Although e.spire appreciates the PSC's motivation regarding this offer, e.spire has serious concerns about the accuracy and ultimate validity of any findings made in such a proceeding. Without the backing of the state statutory authority envisioned by Congress in crafting Sections 251, 252, and 271, e.spire doubts that the PSC can have the influence necessary to ensure that SWBT participates in good faith in either discovery or the resulting arbitration hearings.

In sum, it remains evident that if the FCC does not intervene in this matter and preempt the anti-competitive provisions of the Arkansas Act, local competition in Arkansas will suffer and the mandates of the Communications Act as articulated in Sections 251 and 252 will be rendered moot. Because the Arkansas PSC cannot fulfill its obligations, the Commission must grant e.spire's March 25, 1997 Petition so as to provide all competitive carriers the opportunity to seek meaningful interconnection arbitration in Arkansas.

¹⁰ *Id.* at 12.

¹¹ *Id.* at 13-14.

¹² *Id.* at 12.

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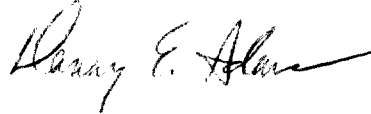
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In accordance with the Commission's rules governing ex parte presentations, two copies of this letter are being submitted.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Danny E. Adams".

Danny E. Adams

cc: Alexander Starr
Joe Welch